

PATRICK E. STOCKALPER, SBN 156954
MOLSHREE GUPTA, SBN 275101
KJAR, MCKENNA & STOCKALPER, LLP
841 Apollo Street, Suite 100
El Segundo, California 90245
Telephone (424) 217-3026
Facsimile (424) 367-0400
pstockalper@kmslegal.com
mgupta@kmslegal.com

Attorneys for Defendants,
COUNTY OF LOS ANGELES and SERGEANT TRAVIS KELLY
(Defendants is exempt from filing fees pursuant to Government Code § 6103)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JOSHUA ASSIFF,

Case No.: 2:22-cv-05367 RGK(MAAx)

Plaintiffs,

V.

COUNTY OF LOS ANGELES;
SHERIFF DEPUTY BADGE
NUMBER 404532; And DOES 1
through 10,

**DEFENDANTS' MOTION IN
LIMINE NO. 4 TO EXCLUDE OR LIMIT
PLAINTIFF'S EXPERT JEFFREY
NOBEL; MEMORANDUM OF POINTS
AND AUTHORITIES**

(Declaration Of Molshree Gupta Filed Concurrently)

Action Filed: August 3, 2022
Pretrial Conference: July 10, 2023
Trial Date: July 25, 2023

Assigned to:
Hon. R. Gary Klausner, District Judge
Courtroom 850

All Discovery Matters Referred to:
Hon. Maria A. Audero, District Judge

1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT defendants COUNTY OF LOS ANGELES and
3 SERGEANT TRAVIS KELLY (collectively “Defendants”) hereby move this Court for
4 an order in limine to exclude or limit evidence, references, argument and testimony from
5 Plaintiff JOSHUA ASSIFF’s police practices expert, Jeffrey Nobel.

6 Defendants bring this Motion on the grounds that this evidence is irrelevant,
7 without proper foundation under FRE 702, and unfairly prejudicial, confusing and/or a
8 waste of time. Therefore, it is inadmissible and should be excluded pursuant to Federal
9 Rules of Evidence §§ 402, 403 and 404. Any attempt to convey this information to the
10 jury would be highly improper and unfairly prejudicial to Defendants, even if the court
11 were to sustain an objection and instruct the jury to not consider these facts. Thus, this
12 motion seeks a ruling in advance.

13 Defendants further move this Court to instruct plaintiffs and their counsel and to
14 require them to advise all witnesses:

- 15 1. Not to attempt to convey to the jury, directly or indirectly, any of the facts
16 mentioned in this Motion without first obtaining permission of the Court outside the
17 presence and hearing of the jury;
- 18 2. Not to make any reference to the fact that this Motion has been filed; and
- 19 3. To warn and caution each of plaintiffs’ witnesses to strictly follow the same
20 instructions.

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1 This motion is made following compliance with the meet and confer requirements
2 of Local Rule 7-3. This Motion is based upon the Memorandum of Points and
3 Authorities and Declaration of Molshree Gupta, served herewith, upon the pleadings and
4 papers on file herein, and upon such other and further oral argument and evidence as
5 may be presented at the hearing on this Motion.

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7 Dated: June 9, 2023

KJAR, MCKENNA & STOCKALPER, LLP

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9 By: Molshreegupta
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11 PATRICK E. STOCKALPER
12 MOLSHREE GUPTA
13 Attorneys for Defendants,
14 COUNTY OF LOS ANGELES and SERGEANT
15 TRAVIS KELLY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION & ARGUMENT

This is a 42 U.S.C. §1983 alleged excessive force case arising out of a traffic stop and subsequent arrest of Plaintiff JOSHUA ASSIFF (“Plaintiff”) by Defendant SERGEANT TRAVIS KELLY (“Defendant Kelly”) on September 24, 2021, in the Santa Clarita Valley. Plaintiff alleges that Defendant Kelly pulled him over for no apparent reason; tasered, choked, pepper sprayed and beat him; and arrested him without probable cause, all in violation of his constitutional rights.

On May 10, 2023, Plaintiff designated an police practices expert named Mr. Jeffrey Nobel. **Exhibit ***. This motion serves to exclude Mr. Nobel as an expert entirely or, in the alternative, certain opinions by Mr. Nobel as they lack sufficient evidentiary foundation, are mere argument, credibility, or evidence weighing opinions, opinions re: intent and motivation, etc. and, thus, are speculative, not helpful to the jury, and are not admissible. See *Federal Rules of Evidence*, Rules 401, 402, 403, and 702.

Under *Federal Rules of Evidence*, Rule 104(a), “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).” Accordingly and pursuant to FRE 104(a), Defendants request such a Daubert hearing outside the presence of the jury to review his testimony if this Court is inclined to deny this motion. *City of Tuscaloosa v. Harcros Chem. Inc.* (11th Cir. 1998) 158 F.3d 548, 564-65 n. 21.

II. LEGAL AUTHORITY FOR MOTIONS IN LIMINE

A motion in *limine* “is any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States* (1984) 469 U.S. 38, 40. Motions in *limine* are well recognized in practice and by case law. See *Ohler v. United States* (2000) 529 U.S. 753, 758; *United States v. Cook* (9th Cir. 1979) 608 F.2d 1175, 1186.

1 The purpose is to avoid the futile attempt of “unring[ing] the bell” when jurors
2 have seen or heard inadmissible evidence, even when stricken from the record. See
3 *Brodit v. Cambra* (9th Cir.2003) 350 F.3d 985, 1004-05 (citing *Kelly v. New West Fed.*
4 *Sav.* (1996) 49 Cal. App. 4th 659, 669). Motions in limine also serve to streamline trials,
5 by settling evidentiary disputes in advance. See *U.S. v. Tokash* (7th Cir. 2002) 282 F.3d
6 962, 968.

7 **III. LEGAL STANDARD FOR EXPERT TESTIMONY**

8 Due to the “special kind prejudice” improper expert testimony may cause, the
9 admissibility requirements of expert testimony are stringent, the party presenting the
10 expert bears the burden of proving the admissibility of the expert’s opinions, and the
11 Court has a duty to screen expert testimony “to ensure that the expert testimony both
12 rests on reliable foundation and is relevant.” *Acad. of Motion Pictures Arts & Scis. v.*
13 *GoDaddy.com, Inc.* (CD. Cal. June 21, 2013) 2013 WL 12122803, at *2 (emphasis
14 added); *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579, 589-90 (“*Daubert*
15 *I*”); *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 147; *Daubert v. Merrell Dow*
16 *Pharma., Inc.* (1995) 43 F.3d 1311, 1315 (“*Daubert II*”); *see also* Fed. Rules Evid. 702.

17 *Federal Rule of Evidence* 702 (“Rule 702”) governs the admissibility of expert
18 testimony stating, “A witness who is qualified as an expert by knowledge, skill,
19 experience, training, or education may testify in the form of an opinion or otherwise if
20 the expert’s scientific, technical, or other specialized knowledge will help the trier of fact
21 to understand the evidence or to determine a fact in issue.”

22 Relevant expert testimony “must be ‘tied to the facts’ of the case” and “assist the
23 trier of fact to understand the evidence or to determine a fact in issue.” Fed.R.Evid. 702;
24 *Daubert I*, 509 U.S. at 591; *Cooper v. Brown* (9th Cir. 2007) 510 F.3d 870, 942
25 (emphasis added and citing *Daubert II*, 43 F.3d at 1315.)

26 It is well-established that expert testimony that weighs factual evidence and/or
27 assigns credibility to certain sources of evidence over others does not assist the trier of
28 fact. See, e.g., *United States v. Toledo* (10th Cir.1993) 985 F.2d 1462, 1470 (holding that

1 “[t]he credibility of witnesses is generally not an appropriate subject for expert
2 testimony.”); *United States v. Ward* (3d Cir. 1948) 169 F.2d 460, 462 (“[T]he ‘expert’
3 may not go so far as to usurp the exclusive function of the jury to weigh the evidence
4 and determine credibility,” or offer improper legal opinions).

5 **IV. UNDISCLOSED OPINIONS MUST BE EXCLUDED**

6 Rule 26 governs discovery and the duty to disclose. Subsection (a)(2) governs
7 disclosure of expert testimony. It states that each party must disclose to the opposition the
8 identity of any expert witness. Fed.R.Civ.P. 26(a)(2)(A). That disclosure must be
9 accompanied by a written report containing: (1) a complete statement of all opinions the
10 witness will express and the basis and reasons for them; (2) the facts or data considered by the
11 witness in forming them; (3) any exhibits that will be used to summarize or support them; (4)
12 the witness's qualifications, including a list of all publications authored in the previous 10
13 years; (5) a list of all other cases in which, during the previous 4 years, the witness testified as
14 an expert at trial or by deposition; and (6) a statement of the compensation to be paid for the
15 study and testimony in the case. Fed.R.Civ.P. 26(a)(2)(B). Rule 37(c)(1) gives teeth to these
16 requirements by automatically excluding any evidence not properly disclosed under Rule
17 26(a), irrespective of the party's bad faith or willfullness. *Yeti by Molly Ltd. v. Deckers*
18 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001).

19 Plaintiff's May 10, 2023, Expert Disclosure attached an expert report by Mr. Nobel
20 which provided the following opinions: 1) Sergeant Kelly's Failure to Use De-Escalation
21 Techniques Was Inconsistent with Generally Accepted Police Practices [**Exhibit B**, Mr.
22 Nobel's Report, pp. 14-15]; 2) Sergeant Kelly's Use of Pepper Spray on Mr. Assiff was
23 Objectively Unreasonable, Excessive and Inconsistent with Generally Accepted Police
24 Practices [**Exhibit B**, Mr. Nobel's Report, pp. 15-20]. Despite acknowledging that he
25 received and reviewed Defendant County of Los Angeles' Responses to Plaintiff's Request
26 for Production, Sets One and Two, and providing the Los Angeles Sheriff's Department
27 Policies as bases for his opinions, Mr. Nobel offered no facts, opinions or conclusions with
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1 respect to either Plaintiff's claims or allegations regarding unlawful arrest, *Monell* liability or
2 punitive damages. In fact, Mr. Nobel's opinions are limited to the subject use of force.

3 Accordingly, such undisclosed and unsupported opinions be excluded.

4 **V. SPECULATIVE OPINIONS MUST BE EXCLUDED**

5 It is well-established that that experts may not offer speculative opinions, including
6 regarding a defendant's intent, motive, state of mind, etc. *Billington v. Smith* (9th Cir.
7 2002) 292 F.3d 1177, 1189, abrogated on other grounds re: "provocation theory" by *Cty.*
8 *of Los Angeles, Calif. v. Mendez* (2017) 137 S. Ct. 1539; *In re: Rezulin Products*
9 *Liability Litigation* (S.D. N.Y. 2004) 309 F.Supp.2d 531, 545-46.

10 Mr. Nobel opines that "[h]ad Sergeant Kelly followed generally accepted police
11 practices and his department policy and used de-escalation to gain voluntary compliance,
12 it is likely that no force would have been necessary." [Exhibit B, Mr. Nobel's Report, p.
13 15.] This opinion makes an unsupported conclusion that Defendant Kelly did not follow
14 generally accepted police practices and his department policy and used de-escalation to
15 gain voluntary compliance. Moreover, speculation as to what may have happened in a
16 hypothetical is not helpful to a jury. The relevant inquiry is whether Defendant Kelly's
17 purported use of force was reasonable under the circumstances in the underlying incident, not
18 some other hypothetical situation.

19 As to Defendant Kelly's intent and motive. Mr. Nobel opines that "Sergeant Kelly
20 unnecessarily ... create[ed] the need to use force that would have likely not have been
21 otherwise necessary." [Exhibit B, Mr. Nobel's Report, p. 15.] Mr. Nobel also opines as to
22 the intent behind Defendant Kelly's communications with Plaintiff during the subject
23 incident. Specifically, Mr. Nobel opines that, "instead of simply telling Mr. Assiff why he
24 had been stopped, Sergeant Kelly initiated the conversation by asking Mr. Assiff the color of
25 the light when he made his turn." [Exhibit B, Mr. Nobel's Report, p. 15.] This opinion
26 assumes that Defendant Kelly's communications were not intended to communication the
27 reason for the traffic stop.

1 Accordingly, Mr. Nobel cannot testify or speculate as to any hypotheticals, or
2 Defendant Kelly's intention or motivations during the incident.

3 **VI. OPINIONS BASED ON HINDSIGHT ANALYSIS MUST BE EXCLUDED**

4 The reasonableness of the force used "must be judged from the perspective of a
5 reasonable officer on the scene, rather with the 20/20 vision of hindsight... Reasonableness must embody allowance for the fact that police officers are often forced
6 to make split second judgments—in circumstances that are tense, uncertain, and rapidly
7 evolving" *Graham v. Connor* (1989) 490 U.S. 386, 396; (citing *Terry v. Ohio* (1968) 392
8 U.S. 1, 20-22; *Monzon v. City of Murrieta* (9th Cir. Oct. 27, 2020) No. 19-55164, 2020
9 WL 6293163, at *5.

10 A police practices experts hindsight analysis and critique does not alone render
11 their opinions relevant, admissible, or helpful to the jury. Mr. Nobel's May 10, 2023,
12 Report states the following improper opinions:

13 "Had Sergeant Kelly followed generally accepted police practices and his
14 department policy and used de-escalation to gain voluntary compliance, it is likely that
15 no force would have been necessary." [Exhibit B, Mr. Nobel's Report, p. 15.]

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19 **VII. MR. NOBEL'S OPINIONS REGARDING DEFENDANT KELLY'S USE OF**
20 **PEPPER SPRAY DUE TO PLAINTIFF'S "PASSIVE RESISTANCE" MUST**
21 **BE EXCLUDED**

22 Mr. Noble opines that "while Mr. Assiff was not complying with Sergeant Kelly's
23 command he was not actively resisting, but merely passively resisting." [Exhibit B, Mr.
24 Nobel's Report, p. 18.] However, immediately thereafter, Mr. Noble concedes that "active
25 resistance is defined as "Physically evasive movements to defeat an officer's attempt at
26 control, including bracing, tensing, running away, or verbally or physically signaling an
27 intention to avoid or prevent being taken into or retained in custody." [Exhibit B, Mr.
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1 Nobel's Report, p. 18.] The foregoing concession, in light of his summary of the incident
2 which concedes that Plaintiff actively resisted Defendant Kelly during the incident, erodes the
3 admissibility of his opinion. Specifically, Mr. Nobel concedes that: 1) when "Sergeant
4 Kelly... reached into the vehicle and tried to pull Mr. Assiff out[,] Mr. Assiff resisted by
5 pulling away..."; 2) "Sergeant Kelly claimed that Mr. Assiff kicked him as he opened the
6 driver's door..."; 3) "Sergeant Kelly told Mr. Assiff to get out of the vehicle or he would be
7 pepper sprayed and [] Mr. Assiff refused..."; 4) "Deputy Clark arrived to assist Sergeant
8 Kelly and both deputies tried to pull Mr. Assiff out of the car..."; "Sergeant Kelly said ... Mr.
9 Assiff puched Deputy Clark in the chest...". [Exhibit B, Mr. Nobel's Report, p. 6.]

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11 **VIII. MR. NOBEL'S OPINIONS REGARDING DEFENDANT KELLY'S USE OF**
12 **FORCE MUST BE EXCLUDED**

13 Mr. Noble opines that Defendant Kelly's punch to Plaintiff's face with a fist was
14 objectively unreasonable because the video does not show Plaintiff punching any deputy
15 during the incident. [Exhibit B, Mr. Nobel's Report, pp. 18-19.] However, none of the
16 videos depicting the incident show any deputy striking Plaintiff either. Mr. Noble
17 proffers his opinion on the fact that Defendant Kelly admits to punching Plaintiff in the
18 face but he lacks substantiating evidence that it occurred.

19 Mr. Nobel reveals his inability to be fair and impartial in his review, because it
20 would be unfair and not factual to assert that Plaintiff did not punch or kick the deputies
21 while asserting that the deputies did hit Plaintiff. If Mr. Nobel can take Defendant Kelly
22 at his word that he struck Plaintiff in the face with his fist, why did he not take
23 Defendant Kelly at his word that Plaintiff kicked him at the outset of this incident or that
24 Plaintiff was not only an active resister but an aggressive assaulter, making Defendant
25 Kelly's actions in striking Plaintiff objectively reasonable?

26 Allowing Plaintiff's expert to opine in light of apparent bias, specifically in light
27 of the threat of the "special kind prejudice" posed by improper expert testimony, would
28 be unfair to Defendant.

1 **IX. MR. NOBEL'S OPINIONS REGARDING DEPUTY CLARK'S USE OF**
2 **FORCE MUST BE EXCLUDED**

3 Mr. Noble opines that Deputy Clark's use of a "neck hold" was an objectively
4 unreasonable use of force. [Exhibit B, Mr. Nobel's Report, pp. 19-20.] Mr. Noble uses the
5 Plaintiff's video as evidence that Deputy Clark wrapped his arm around Plaintiff's neck, but
6 the still photo offered as proof shows that Deputy Clark had his arm just above the neck at the
7 back of the head and on the jaw. Moreover, the entire video is very quick (30 seconds) and
8 inconclusive as to how long Deputy Clark's arm was in the area of Plaintiff's neck.

9 Once again, by unfairly characterizing Deputy Clark's conduct, Mr. Nobel reveals
10 his inability to be fair and impartial in his review. Allowing Plaintiff's expert to opine in
11 light of apparent bias, specifically in light of the threat of the "special kind prejudice"
12 posed by improper expert testimony, would be unfair to Defendant.

13 **X. MEET AND CONFER**

14 On June 8, 2023, and on June 9, 2023, counsel for Defendants wrote to counsel for
15 Plaintiff to request to met and conferred on the substance of this Motion in *Limine*.
16 Gupta Decl. ¶ 4. No agreement could be reached. Gupta Decl. ¶ 4.

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1 **XI. CONCLUSION**

2 Based on the foregoing, defendants respectfully request the Court grant this
3 Motion in *Limine*, and exclude or limit evidence, references, argument and testimony
4 from Plaintiff JOSHUA ASSIFF's police practices expert, Jeffrey Nobel.

5 Dated: June 9, 2023

6 KJAR, MCKENNA & STOCKALPER, LLP

7

8 By: Molshee Gupta

9 PATRICK E. STOCKALPER

10 MOLSHREE GUPTA

11 Attorneys for Defendants,

12 COUNTY OF LOS ANGELES and SERGEANT

13 TRAVIS KELLY

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 841 Apollo Street, Suite 100, El Segundo, California 90245.

On June 9, 2023, I served the foregoing document described as **DEFENDANTS' MOTION IN LIMINE NO. 4 TO EXCLUDE OR LIMIT PLAINTIFF'S EXPERT JEFFREY NOBEL; MEMORANDUM OF POINTS AND AUTHORITIES** on all interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

By Mail I caused such envelope(s) to be deposited in the mail at El Segundo, California. The envelope was mailed with postage thereon fully prepaid and addressed to the parties listed on the Service List. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

XX By Email Based upon a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed in the Service List. My email address is mnixon@kmslegal.com.

By Personal Service I caused such document to be Personally Served on the parties listed in the Service List.

XX State I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 9, 2023, at El Segundo, California.

Maria Nixon

SERVICE LIST

Assiff, Joshua vs. County of Los Angeles, et al.

Central District- Case No.: 2:22-cv-05367 RGK(MAAx)

<p>Thomas M. Ferlauto, Esq. Law Office of Thomas M. Ferlauto, APC 25201 Paseo de Alicia, Ste. 270 Laguna Hills, CA 92653 EM: tmf@lawofficetmf.com</p>	<p>Attorney for Plaintiff, JOSHUA ASSIFF</p>
<p>Philip Cohen, Esq. Law Offices of Philip Kent Cohen, APC 100 Wilshire Boulevard, Suite 1300 Santa Monica, CA 90401 Telephone: 310/451-9111 Facsimile: 310/451-9119 EM: pcohen@pcohenlaw.com</p>	<p>Co-Attorney for Plaintiff. JOSHUA ASSIFF</p>